BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES A. BOHANNAN	)	
Claimant	)	
	)	
VS.	)	
	)	
NORTHWEST PIPE OF KANSAS	)	
Respondent	)	Docket No. 1,048,047
	)	
AND	)	
	)	
SENTRY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the March 3, 2010 preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders (ALJ).

ISSUES

The ALJ denied claimant's request for temporary total disability benefits and medical care after concluding that claimant failed to show timely notice of an accidental injury as required by K.S.A. 44-520.

Claimant requests review of two issues: 1) whether he sustained an accidental injury arising out of and in the course of his employment with respondent, and 2) whether he provided timely notice of his injury. Claimant argues that the preponderance of the evidence shows he sustained an accidental injury arising out of and in the course of his employment with respondent and provided timely notice of this injury. Thus, the ALJ's preliminary hearing Order should be reversed and benefits should be provided.

Respondent argues that the ALJ should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant has worked in the construction industry for an extended period of time and not surprisingly, he has a history of back problems dating back a number of years. In 2006, claimant was treating with Drs. Johanning (his primary care physician) and Dr. Fritz (a surgeon) and eventually had back surgery to remove bone fragments from his low back. Claimant returned to work and was able to perform all the necessary duties for his job with respondent as a slitter operator. This position required claimant to take pieces of steel and feed it into a machine which would slice it to the desired width.

Claimant alleges he initially was injured about February 9th or 10th, 2009, but on a Friday, which would be February 13, 2009, when a piece of steel got caught in his glove, causing him to turn completely around and fall to the floor. Claimant believes that a co-worker witnessed this accident, but he concedes he did not report the accident to his supervisor on that day. Claimant alleges he hurt his low back as a result of this accident.

Claimant was unable to get out of bed the next day, Saturday, February 14, 2009 and on Monday, February 16, 2009, he contacted Dr. Johanning about his low back pain. Claimant testified that Dr. Johanning sent him for an MRI. Claimant also testified that he contacted Steve Meeks, the plant supervisor, on that Monday, the 16th, and told him of the injury. Claimant says Mr. Meeks told him to complete a form for short-term disability.[1] Claimant eventually filed for short-term benefits and the record reveals that claimant was off work on Family Medical Leave (FML) from February 24 to April 17, 2009. Respondent concedes there was a policy in effect that rewarded the workers for injury-free periods of time. Claimant maintains that he was encouraged (by Mr. Meeks) to use the short-term disability program rather than filing a workers compensation claim.

When he returned to work he was released to full duty and was "feeling pretty good".[2] However, claimant alleges he began to sustain a series of injuries commencing June 1, 2009 and continuing to June 29, 2009. Sometime in early June, 2009, claimant says he had a second, similar accident when he reached over the slitter machine and his back started hurting again.[3] Claimant says he told Mr. Meeks again of this injury and was again told to file for short-term disability. Instead, claimant continued working but this time, at light duty. Claimant says he went to see Dr. Johanning again and during this time claimant apparently had physical therapy and at least one round of epidural injections.

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[1] P.H. Trans. at 14.

[2] *Id.* at 16.

[3] *Id.* at 17.

Then on June 29, 2009, claimant cut off his finger while he was working. He was taken to the hospital for medical treatment and was off work for another period of time, again classified as FML. When he returned to work, presumably on August 10, 2009[4] he was assigned to watch safety videos and later, to assist a coworker holding electrical wires.

Claimant says he stopped working for respondent on July 12, 2009, but this is not borne out by respondent's attendant's records. Those records indicate claimant returned to work on April 20, 2009 and worked fairly regularly (vacation days excepted) until June 29, 2009, when he injured his thumb. At that point, he again took FML beginning July 6, 2009 and continuing until August 10, 2009, when he returned to work for approximately 2 weeks. After August 24, 2009, he was no longer at work and off on a personal leave of absence.[5]

This is not the only inconsistency found in the record. While claimant says that he told Mr. Meeks of his injury, Mr. Meeks denies this. Mr. Meeks concedes that he knew claimant had back problems, but he believed that condition dated back to 2006 or 2007. Mr. Meeks does not recall any conversation with claimant about short-term disability, but acknowledges an incentive program within the company that rewards the employees when they have no loss of time due to accidents within a year's time. Mr. Meeks seemed to be aware of claimant's low back problems, but until the initiation of this claim in late October 2009, he never understood that claimant was alleging that work was the cause of his low back complaints. It was only when the carrier contacted him about the low back claim that Mr. Meeks became aware that claimant was asserting a work-related accident.

Similarly, claimant's supervisor, Damian Gronniger, testified that he was aware of claimant's low back problems, but that he was never led to believe that work was the cause of that condition. He simply understood that claimant was absent from work on FML due to his long standing low back problems.

Jeff McMillan, the human resources director, testified that claimant had been off work in 2006 and 2007 due to low back complaints and took FML during that period. Then again in February and June 2009, claimant sought him out and asked for FML for his low back problems. When the FML was about to expire, Mr. McMillan referred claimant to Dr. Shriwise as claimant contended he would be unable to return to work.

Dr. Shriwise's records refer to an incident *at work* in February and again in June 2009 which involved an acute flair up of the low back pain. Curiously, this same history is not reflected in any of the visits to Dr. Johanning, beginning with the March 9, 2009 visit. Although Dr. Johanning's records reflect claimant's onset of low back pain, they do not

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[4] These are the dates reflected on Resp. Exhibit D from the preliminary hearing transcript.

[5] P.H. Trans., Resp. Exhibit D.

reference any trauma or accident. In fact, Dr. Johanning's records indicate claimant had a "history of ... [pain beginning] ... about two weeks ago when he woke up one morning and started having lower back pain..... **This time he had no trauma. He woke up with it**."[6] Claimant continues to see Dr. Johanning every few weeks and it is clear from the records, that Dr. Johanning is hoping to have Dr. Fritz (the surgeon) approve a series of epidurals. On June 18, 2009, claimant reported a "now six day history of low back pain that has now progressed to extreme left sided radiculopathy down into his leg."[7] There is no reference to another accident at work, simply a flare up of pain.

The ALJ concluded that claimant failed to give respondent timely notice of his accident, thus denying claimant the benefits he seeks. This appeal followed. The ALJ's Order does not indicate whether or not she also concluded that claimant had met with personal injury by accident or accidents arising out of and in the course of his employment. Because it is impossible to surmise whether the underlying compensability issue was considered and decided, this Board Member will not address this aspect of the appeal as the ALJ did not make any findings with respect to whether claimant's accidental injury arose out of and in the course of his employment.[8]

Claimant appealed the ALJ's conclusion on the issue of notice. K.S.A. 44-520 provides as follows:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer **within 10 days after the date of the accident,** except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

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[6] *Id.*, Resp. Ex. B at 1 (Mar. 9, 2009 office note).

[7] *Id.*, Resp. Ex. B at 4 (June 18, 2009 office note).

[8] *Colbert v. U.S.D. 475*, No. 1,035,780, 2008 WL 375808 (Kan. WCAB Jan. 28, 2008).

In order to determine if claimant's statutorily required notice is timely, the finder of fact must first determine the date of accident. Claimant alleges a series of injuries from June 1, to June 29, 2009. Thus, the date of accident determination is governed by the principles set forth in K.S.A. 44-508(d). K.S.A. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. **In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing.** Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[9] (Emphasis added.)

The ALJ's Order does not reflect a finding of claimant's date of accident consistent with the principles set forth above. Although she concluded claimant's notice was untimely, it is impossible to determine whether that finding was proper as no date of accident has yet to be found. Claimant maintains he has been giving notice to respondent since February 2009 while respondent's witnesses deny any such notice and maintain its first notice of this accident was October 29, 2009, the date the claim was filed and the carrier emerged to defend the claim. The medical records do not consistently reference a work-related injury as the source of claimant's ongoing back complaints. Moreover, claimant left work on June 29, 2009 (the alleged last day of the series of injuries) due to a separate injury to his thumb, *not* because of his low back complaints.

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[9] K.S.A. 2005 Supp. 44-508(d).

The ALJ believed claimant had failed to meet his burden of persuasion on the issue of notice.[10] But without a legal conclusion as to the date of accident, this Board Member is unable to determine if the ALJ's ultimate conclusion is proper and consistent with existing law. Accordingly, the ALJ's preliminary hearing Order is reversed, set aside, and this matter is remanded for further proceedings consistent with this Order.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[11] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated March 3, 2010, is reversed, set aside, and this matter is remanded for further proceedings consistent with the findings above.

IT IS SO ORDERED.

Dated this _____ day of April 2010.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
David P. Mosh, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge

[10] The ALJ's Order says "[b]oth the [c]laimant and the two employer witnesses are equally credible. However, it is the [c]laimant that must show that it is more probably true than not that he gave timely notice of the accident." ALJ Order (Mar. 3, 2010) at 3.

[11] K.S.A. 44-534a.